

FOURTH MEETING WITH
ATTORNEY ADVISORY COUNCIL
JULY 12, 2002 1:30 P.M. TO 3:30 P.M.

Attendees:

Attorney Advisory Council Members:

Fredrich J. Cruse
The Cruse Law Firm

David Warfield
Husch & Eppenberger

Steven Goldstein
Goldstein & Pressman, P.C.

Susan Reiss
Bryan Cave, LLP

Peter Lumaghi
Office of the U.S. Trustee

Janice Valdez
Stone, Leyton, Gershman, PC

Wendell Sherk
Sherk & Swope, LLC

Court Members: Dana McWay

Court Attorney Advisory Committee: Bill Wolfenbarger, Diana Durkee-August, Wynne Abernathy, Susan Spraul, Chris Keefe, Sandy Louis and Roe Blankinship

I. Comments on Minutes of Last Meeting

A. U.S. Attorney Comments & Final Issues on Use of Declaration Form - The Council discussed comments from Rosemary Meyers, an attorney with the United States Attorney's Office, regarding the attorney declaration form. To be valuable, the declaration form, if used, would need to be linked to each relevant document submitted to the Court. The U. S. Attorney's Office felt the declaration form is unnecessary as attorneys are required to keep the original documents in their files and the original signed document would be necessary in most prosecutions. The Council recommended the Court's Administrative Procedures require the filer to retain the original documents and produce them upon request by the Court.

The Council discussed the concern that the attorney's retention and production of original documents might interfere with the attorney-client privilege. The Council concluded no privilege exists as to documents which are a matter of a public record.

If a declaration is going to be used, a suggestion was made to have the trustee retain the original declaration form. However, the Council's overall recommendation was declaration forms were not necessary.

B. Website Information - The Court reports ECF Advisory Council meeting minutes are posted on the Court's website along with Council members' names and addresses.

C. Version 2 of CM/ECF Software - The Court reported Version 2 Software is reported to be available in early September, 2002. If the software is delivered on schedule, the bar would not be asked to electronically file until sometime after January 1, 2003.

II. New Items - Current Agenda

A. Status of CM/ECF Project and Ongoing Role of Advisory Council

Role of Council - Currently, the Advisory Council's role has been to identify issues affecting practitioners in anticipation of ECF usage. The Council has produced various recommendations and comments which the Court will consider in its process of making implementation decisions. As the Court progresses, Council members will be consulted for comments on materials, such as training materials, or in response to discreet questions of implementation. The Court plans to meet with the Council in the fall of 2002.

Training Efforts - The Court's training committee is preparing a general survey to be mailed to approximately 500 practitioners in the Eastern District of Missouri. Please send any new ideas to the Court via e-mail, etc.

B. Continued Information Gathering/Brainstorming Session

1. General Issues

Free Look - Mr. Cruse advised he had a problem with his software while attempting to download documents sent to him from the Western District of Missouri. He didn't actually receive the documents, and when he went in the system to look for them, he had lost his "free look." He suggested the Court make sure the Help Desk is aware of this point so that attorneys are actually afforded the "free look."

System downtime - The Council discussed issues regarding an emergency filing when the Court's system is down. Although the Court will retain log files which indicate when the system was down, the Council recommended the Court have a procedure for attorneys to follow to demonstrate a filing should be deemed "timely" when the filing was prevented because of internal technical problems. The Western District has a set procedure whereby the filer has to show the necessary steps were followed. The Council generally suggested the following: if the system was down and the filer wants the Court to recognize the attempt to file, the filer must submit:

1. A motion to allow the filing with proof that the system was down and an attempt to file was made;
2. an affidavit stating the facts surrounding the attempted filing.
(for pro-se filers the Court will accept paper).

The burden of proof should be on the filer but the process should be simple and should only be used if the Court's system is down, not if there are technical problems on the

user's/attorney's end.

A related question concerns the Court's Drop Box. If the Court moves to 100% ECF usage, will the Drop Box still be available to attorneys when the system is down? If so, what would be filed in the Drop Box: paper pleadings or pleadings on computer diskettes?

Retention of documents - Several issues were raised in this area. What is the Court to do with paper filings after they have been scanned into the Court's system? Should the Court scan then discard the paper? Should the Court scan and return? Who will keep paper originals on pro-se filings? Does a scanned copy of a document fall under the best evidence rule? (Note: The Council thought the answer is likely "yes," regarding best evidence if the original has been destroyed). These are issues the Court should consider.

The Council recommended the Court scan and pitch paper originals. Because the filer's signature is on the ECF image, and because it is thought the ECF rules would say the electronic image is the "official record," the original documents would not need to be retained by the Court.

If paper originals are to be returned, a suggestion was made that postage-paid, self-addressed envelopes need to be provided by the filer. If the proper envelope is not provided, the Court would discard the original document after imaging. The Council recommended the Court should keep any rule concerning the disposition of paper documents simple and should not make rules to cover extreme circumstances.

The final consensus was that it would be acceptable and simplest for the Court to scan and then discard any filings submitted in paper form.

Electronic filing v. paper filing - The Council discussed the possibility of having a dual system (filers could file either through ECF or paper) for 3, 6, 9 or 12 months until the "go live/mandatory" date. The interim period would be less than one year. Pro-se filers, for the foreseeable future, will continue to file in paper format.

To encourage early, voluntary use of ECF, the Council was asked what incentive would be attractive to practitioners. An example would be for an electronic filer's matters to be placed at the top of the docket. One suggestion emerged that attorney fees be reduced for those not using ECF.

2. Filing Fees

Unpaid Fees - If the filing fee is not paid, the system has the ability to send an e-notice of a deficiency. Although the ECF system will permit filings without the filing fee, the Court does not wish to have an employee specifically tracking filing fee deficiencies. One suggestion from the Council was for the Court to require the filing fee be paid within 24 hours from close of business on the date the e-notice of deficiency was sent. The Council felt that an automatic

dismissal would be appropriate for any fees that are unpaid.

Installment Applications - An Application to Pay Filing Fee in Installments can be filed with the petition in ECF. Presently, if an Application is filed, the debtor need not submit any money with the petition if denoted on the Application. The expectation is the same under ECF.

3. New Petitions -

Official Forms - The Council discussed use of commercial software packages for preparing bankruptcy petitions and that most packages are CM/ECF compatible. The Council raised the problem that some filers are using out-of-date bankruptcy forms and asked whether ECF will allow use of old forms. Reference was made to the Statement of Financial Affairs as an example and to the fact that two new questions have been added to the Official Form, but the Court still accepts the old form. Additionally, Council noted that some individuals are filing claims on proof of claim forms that are 20 years old. Council recommended the Court enforce use of current forms but recognized Rule 9009 permits use of forms with alterations and that enforcement was a judicial function. Overall suggestion was for the Court to establish a Local Rule (for non-ECF and ECF practice) that requires a deficiency be issued for any form not in compliance with current Official Forms. Another suggestion was to have the Court issue sanctions and/or order disgorgement of fees and/or dismissal of case for use of out-of-date forms. The Council recommended enforcement of forms usage is the responsibility of the judges.

No Asset Opening - Council discussed whether filers under ECF will have the obligation or option to select whether a case is filed as an “asset” or “no-asset” case. Presently, all Chapter 7 cases are opened as a no-asset case, and the expectation is the procedure will be followed in ECF.

Notice of Commencement of Case - Under ECF, the Court will continue to issue the Notice of Commencement of Case. Additionally, in Chapter 11 and 12 cases, the Court is looking at the possibility of sending the Notice of Commencement as well. Presently, attorneys for the debtor are required to mail the Notice in Chapter 11 and 12 cases. Mr. Goldstein offered it is increasingly difficult for Chapter 11 counsel to find good/competent mailing services to hire and it would assist Chapter 11 counsel if the Court resumed sending Notices of Commencement of Case.

Bulk Filing - Companion Case Filing - Attorneys who file cases in bulk do so in order to have case numbers and 341 meeting assignments issued in numerical and date sequence. The same applies to related Chapter 11 cases. The ECF system does not provide a mechanism to ensure a filer’s cases are all issued sequential case numbers. The Court indicated it is hopeful the system will be able to accommodate bulk filers’ needs in this area in the future.

4. Matrix / Amendments

The matrix must be prepared in a text file, not PDF for use by BNC (Bankruptcy Noticing Center). This point needs to be covered in training sessions for attorneys. The Court would like

some type of notice filed with any amended matrix, explaining the reason for the amendment. Such a notice would also be very helpful for amended schedules and is a concept applicable to present operations as well as under ECF. Discussion about the process for amended matrix was deferred for further investigation on how amended matrices worked within CM/ECF.

The Council observed that when filing or amending matrix in cases with more than one debtor, the attorney must hold down the shift key to select both debtors when using ECF. Problems experienced in using ECF at other courts prompted the suggestion that this item be added to training sessions.

5. Motions - Council discussed that the CM/ECF system provides a drop-down menu of available motions as well as options for multi-part motions.

Certificates of Service - It is better to make the certificate of service a part of the document/motion rather than create a separate document. It was recommended this item is added to training sessions as well.

Proposed Orders - Proposed orders can be sent via e-mail in PDF or Word Processing format. Council members reported using this method in other Courts. The Court is continuing to investigate other options available for submission of proposed orders as well.

Sealed Documents - The Council discussed filing sealed documents in ECF and recommended the movant file a motion (using ECF) to file documents under a seal. Upon approval of the motion, the movant would then provide documents to the court for placement under the seal.

6. Adversaries

Summons - The Court needs to explore how summonses will issue under ECF.

E-Notice of Adversaries - The Council recommended the ECF system limit e-mail notices to parties in an adversary proceeding so that parties to adversaries do not receive notification of every document filed in the case. (e.g. parties to an adversary do not want notice of every claim filed in the bankruptcy case.)

Trial Practice - How exhibits will be filed was deferred to final meeting. Council concluded, however, Judges will continue to prefer hard copies of exhibits in binders for trial.

7. Reaffirmation Agreements - Council discussed filing and retention of original reaffirmation agreements. Council concluded the Court need not specify who retains the original document. Creditors, in all likelihood, will want to retain the original agreements and an appropriate procedure would be to require whichever party files the agreement to retain the original. The Court will continue to set unsigned reaffirmation agreements for hearing.

8. Proofs of Claims - The Council requested the Court not send notice of each proof of claim filed to all parties. Because the system sends electronic notification to any party in a case, the system would need to be reconfigured, if possible, to accommodate this request.

The Council indicated trustees need to be involved in discussions regarding proofs of claim, especially Mr. LaBarge due to the heavy Chapter 13 claim volume handled by the trustee's office.

Other claim issues the Court is considering include (1) limited ECF registration and filing privileges for large bulk proof of claim filers; and (2) procedures for other pro se filing.

Next Meeting August 9, 2002 from 1:30 - 3:30 p.m. on the 28th floor.

Topics: Exhibits and Electronic Notification